Waffle House, Inc. *and* Carrie Harris. Case 10–CA–121178

February 1, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

Upon a charge filed January 24, 2014, by Carrie Harris, the General Counsel issued a complaint and notice of hearing on April 29, 2014, alleging that the Respondent has been violating Section 8(a)(1) of the Act by at all material times maintaining and enforcing an Arbitration Agreement containing a "No Consolidated, Collective, or Class Action Arbitrations" provision.

On December 12, 2014, the Respondent, the Charging Party, and the General Counsel filed a joint motion to waive a hearing and decision by an administrative law judge and to transfer the proceeding to the Board for a decision based on the stipulated record. On June 18, 2015, the Board granted the parties' joint motion. Thereafter, the Respondent and the General Counsel filed briefs, and the Respondent also filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Georgia corporation with a headquarters and place of business in Norcross, Georgia, is engaged in the operation of retail restaurant facilities located throughout the United States. During the 12-month period ending on December 12, 2014, the Respondent, in conducting its business, derived gross revenue in excess of $500,000 and purchased and received at its Georgia facilities goods valued in excess of $50,000 directly from points outside the State of Georgia. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

The Respondent operates over 970 retail restaurant locations in 9 states in the United States. The Respondent's employees are not represented by a labor organization at any of its locations.

Since about December 31, 2007, the Respondent has maintained an Arbitration Agreement (Agreement), which contains the following provisions:

> **2. Claims covered by this Agreement**. . . . Waffle House and I will resolve by arbitration all claims and controversies . . . past, present, or future, whether or not arising out of my employment or termination from employment, that I may have against Waffle House . . . or that Waffle House may have against me. The claims that are arbitrable:
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> - are those that, in the absence of this Agreement, would have been heard in a court of competent jurisdiction under applicable state or federal law[ ] . . . .
>
> ****
>
> Except as otherwise provided in this Agreement, both Waffle House and I agree that neither of us shall initiate or prosecute any lawsuit or administrative action (other than an administrative charge to the EEOC, NLRB, or a similar government agency) in any way related to any claim covered by this Agreement.
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> ****
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> **9. No Consolidated, Collective, or Class Action Arbitrations.** Neither party shall be entitled to: (i) join or consolidate claims in arbitration by or against other employees, (ii) arbitrate any claim against the other party as a representative or member of a class action or collective action, or (iii) arbitrate any claim in a private attorney general capacity.

Since at least July 24, 2013, the Respondent has required each of its employees to become a party to the Agreement as a mandatory term and condition of employment. The Agreement states that if an individual does not become a party to the Agreement, he or she "would either not be employed or remain employed" by the Respondent. The Agreement also provides that an employee may revoke his or her agreement "at any time within 7 days of . . . signing this Agreement, but such revocation" will result in the employee's "immediate termination, demotion and/or denial of consideration for employment or in the loss of [his or her] ownership of certain stock or stock options awarded to [him or her] by Waffle House in consideration of [his or her] execution of this Agreement, as the case may be."

On October 28, 2013, the Respondent hired employee Carrie Harris to work as a salesperson at its Port Wentworth, Georgia restaurant. The Respondent presented Harris its Agreement, provided her with an opportunity

to review it, and required her to sign it as a term and condition of her employment. Harris signed the Agreement on October 28, 2013.

B. Discussion

In *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), reaffirmed in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 2 (2014), enf. denied in relevant part *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), the Board held that an employer violates Section 8(a)(1) of the Act "when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." *D. R. Horton, Inc.*, above, slip op. at 1.[1]

Here, we find that the Respondent violated Section 8(a)(1) by maintaining the Agreement.[2] Like the policies at issue in *D. R. Horton* and *Murphy Oil*, the Respondent's Agreement requires employees, as a condition of their employment, to submit their employment-related legal claims to individual arbitration, thereby compelling employees to waive their Section 7 right to pursue such claims through class or collective action in all forums, arbitral or judicial. See *D. R. Horton*, above, slip op. at 1; *Murphy Oil*, above, slip op. at 8–9 ("Insofar as an arbitration agreement prevents employees from exercising their Section 7 right to pursue legal claims concertedly . . . the arbitration agreement amounts to a prospective waiver of a right guaranteed by the NLRA.").[3]

[1] The Respondent argues that *D. R. Horton* and *Murphy Oil* were wrongly decided and should be overruled. We disagree and adhere to the findings and rationale in those cases. Further, for the reasons fully stated in *Murphy Oil*, we reject the Respondent's contentions that *D. R. Horton* was not decided by a validly appointed Board, 361 NLRB No. 72, slip op. at 2 fn. 10, and that its reliance on the Norris-LaGuardia Act is flawed. Id., slip op. at 10.

[2] Although the complaint alleged that the Respondent also unlawfully enforced its Arbitration Agreement, there is no evidence or claim of any enforcement action. See generally *Logisticare Solutions, Inc.,* 363 NLRB No. 85, slip op. at 1 fn. 2 (2015).

[3] We note that the Respondent does not contend that the 7-day opt-out provision of its Agreement places it outside the scope of the prohibition against mandatory individual arbitration agreements under *Murphy Oil* and *D. R. Horton*. This is probably because, unlike many other opt-out provisions, see, e.g., *CPS Security (USA), Inc.*, 363 NLRB No. 86, slip op. at 1 fn. 2, 8 (2015); *Domino's Pizza, LLC,* 363 NLRB No. 77, slip op. at 2 fn. 3, 6 (2015); *On Assignment Staffing Services,* 362 NLRB No. 189, slip op. at 3 (2015), the Respondent's does not permit an employee who opts out to remain employed. In any event, the Board has rejected this argument, holding that an opt-out procedure still imposes an unlawful mandatory condition of employment that falls squarely within the rule of *D. R. Horton* and *Murphy Oil*, *On Assignment Staffing Services,* above, slip op. at 1, 4–5, even when opting out does not automatically terminate an employee's employment.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, the Respondent has violated Section 8(a)(1) of the Act and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and

The Respondent and our dissenting colleague do, however, argue that the Agreement is voluntary because employees could decline employment at Waffle House and choose an employer that does not require them to agree to individual arbitration as a condition of employment. We disagree. Because refusing to sign the Agreement or opting out of the Agreement would result in "immediate termination, demotion and/or denial of consideration for employment," acceptance of the Agreement was a condition of employment and not a voluntary choice. See *Countrywide Financial Corp.*, 362 NLRB No. 165, slip op. at 2 fn. 4 (2015). Moreover, an arbitration agreement that precludes collective action in all forums is unlawful even if entered into voluntarily because it requires employees to prospectively waive their Sec. 7 rights to engage in concerted activity. See *On Assignment Staffing Services,* above, slip op. at 1, 5–8.

The Respondent also argues that its Agreement includes an exemption allowing employees to file charges with administrative agencies, including the Board, and thus does not, as in *D. R. Horton* and *Murphy Oil*, unlawfully prohibit employees from collectively pursuing litigation of employment claims in all forums. In support of its argument, the Respondent cites *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–1054 (8th Cir. 2013), in which the court stated, in dicta, that the arbitration agreement in that case did not bar all concerted employee activity in pursuit of employment claims because the agreement permitted employees to file charges with administrative agencies that could file suit on behalf of a class of employees. We reject the Respondent's argument for the reasons set forth in *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 2–4 (2015).

Our dissenting colleague observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, 361 NLRB No. 72, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to *pursue* joint, class, or collective claims if and as available without the interference of an employer-imposed restraint." *Murphy Oil*, above, slip op. at 2 (emphasis in original). The Respondent's Agreement is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the Agreement unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, above, slip op. at 17–18; *Bristol Farms*, above, slip op. at 2.

desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to rescind or revise its mandatory arbitration agreement and to notify employees that it has done so. Finally, because the Respondent utilized the Agreement on a corporate-wide basis, we shall order the Respondent to post a remedial notice at all locations where the Agreement was in effect.

ORDER

The National Labor Relations Board orders that the Respondent, Waffle House, Inc., Norcross, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its Norcross, Georgia facility and at all other facilities where the unlawful arbitration agreement is or has been in effect copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 24, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., February 1, 2016

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues find that the Respondent's Arbitration Agreement (the Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to participate in class or collective actions regarding non-NLRA employment claims. I respectfully dissent from this finding for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[1]

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

The Respondent contends that its Agreement is voluntary, notwithstanding that signing it is a condition of employment. I agree. Charging Party Harris voluntarily signed the Agreement, even though the Respondent was willing to hire her or continue her employment only if she entered into the Agreement. By definition, every agreement sets forth terms upon which each party may insist as a condition to entering into the relationship governed by the agreement. Thus, conditioning employment on the execution of a class-action waiver does not make it involuntary. For my colleagues, however, the voluntariness of such a waiver is immaterial. They believe that even if a waiver is nonmandatory, it is still unenforceable. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 4–5 (2015) (finding class-action waiver agreement unlawful even where employees are free to opt out of the agreement); *Bristol Farms*, 363 NLRB No. 45 (2015) (finding class-action waiver agreement unlawful even where employees must affirmatively opt *in* before they will be covered by a class-action

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than the Act.[2] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[3] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[4] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;[5] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[6] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province

waiver agreement, and where they are free to decline to do so). Needless to say, I disagree. See *Bristol Farms*, above, slip op. at 2–4 (Member Miscimarra, dissenting).

Although the Agreement contains an opt-out provision that permits an employee to revoke his or her agreement in writing "at any time within 7 days" after signing the Agreement, it does not necessarily permit an individual to remain employed after revoking the Agreement. Rather, the Agreement states that revocation "*will result in my immediate termination*, demotion and/or denial of consideration for employment or in the loss of my ownership of certain stock or stock options awarded to me by Waffle House in consideration of my execution of this Agreement, as the case may be" (emphasis added). Therefore, on the stipulated record currently before us, which requires an evaluation of the foregoing language on its face, it is not clear that any person will be afforded the option of remaining employed following revocation of the Agreement. Moreover, as my colleagues have indicated, the Respondent has not argued that the 7-day opt-out provision separately warrants a finding that the Agreement is voluntary. In these respects, I believe this case materially differs from *Nijjar Realty, Inc. d/b/a Pama Management*, 363 NLRB No. 38, slip op. at 3–5 (2015) (Member Miscimarra, dissenting), where the opt-out provision reinforced my view that the class-action waiver was voluntary and lawful under Sec. 8(a)(1). Consequently, my view that the Agreement is lawful does not attach any weight to the Agreement's opt-out provision.

[2] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu,* 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting). Here, there is no allegation that Charging Party Carrie Harris ever pursued any non-NLRA claim against the Respondent in a class or collective action, let alone that she sought the support of any other employee regarding any potential claim. Accordingly, the record fails to establish that Harris engaged in protected concerted activity. See *Beyoglu*, above (Member Miscimarra, dissenting) (finding that employee's individual act of filing a collective action was not concerted activity).

[3] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[4] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[5] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil USA, Inc. v. NLRB*, above; *D. R. Horton, Inc. v. NLRB,* above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil,* 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc*., 96 F. Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.,* No. 1:12–cv–00062–BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

[6] For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil,* above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.[7]

Accordingly, I respectfully dissent.

Dated, Washington, D.C. February 1, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

WAFFLE HOUSE, INC.

The Board's decision can be found at www.nlrb.gov/case/10-CA-121178 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[7] Because I disagree with the Board's decisions in *Murphy Oil,* above, and *D. R. Horton, Inc.,* 357 NLRB No. 184 (2012), enf. denied in pert. part 737 F.3d 344 (5th Cir. 2013), and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they "leave[ ] open a judicial forum for class and collective claims," *D. R. Horton*, 357 NLRB No. 184, slip op. at 12, by permitting the filing of complaints with administrative agencies that, in turn, may file class- or collective-action lawsuits. See *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013).